

Hagar Management Corp. and 1025-1045 Associates, Inc. and Wilfredo Arteaga

Hagar Management Corp. and 1025-1045 Associates, Inc. and Venicio Bonilla

Hagar Management Corp. and 1025-1045 Associates, Inc. and United Service Employees Union Local 377, R.W.D.S.U., AFL-CIO

1025-1045 Associates, Inc. and Local 32B-32J, Service Employees International Union, AFL-CIO.
Cases 29-CA-15842, 29-CA-15907, 29-CA-15966, 29-CA-15967, and 29-CA-15945

February 24, 1993

ORDER GRANTING MOTION

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On September 21, 1992, an administrative law judge issued a decision and recommended order in the above proceeding finding, *inter alia*, that Respondent violated the Act by discharging Anthony Mitchell and Courtney Thompson. The judge's order required Respondents to offer the discharged employees reinstatement and make them whole for any loss of earnings they may have suffered. Pursuant to the Respondents' request, the time to file exceptions was extended to November 6, 1992. On December 4, 1992, in the absence of exceptions, the Board issued an Order adopting the decision of the administrative law judge.

On January 12, 1993, the Respondents filed a motion to reopen to permit exceptions to be filed.¹ In support thereof, the Respondents' counsel avers that on November 4, 1992, counsel for the General Counsel transmitted a draft stipulation incorporating the terms of a settlement negotiated between the General Counsel and the Respondents' counsel, that the Respondents' counsel telephoned the General Counsel on November 4, 1992, and raised two problems concerning the draft stipulation: (1) the absence of a statement that the two alleged discriminatees had agreed to waive reinstatement; (2) the accuracy of the amount of interim earnings claimed by the discriminatees; that the General Counsel advised the Respondents that the waiver of reinstatement did not have to be in the stipulation, that with respect to the accuracy of interim earnings, the General Counsel advised that this matter would be looked into and the General Counsel would get back to the Respondents' counsel; that on November 5, 1992, the General Counsel advised the Respondents that there was no basis for deviating from the interim earnings figures set forth in the settlement stipulation, and that the General Counsel had not yet received a

requested report from the Social Security Administration on the interim earnings of the discriminatees.

Based on the General Counsel's representation, Respondents' counsel "agreed not to file exceptions and enter into the stipulation provided the Region would review the Social Security report and revise the back-pay numbers if the report showed in fact additional interim earnings." Respondents' counsel also asserts that he advised the General Counsel that "Respondents were willing to put themselves completely in the Region's hands in determining the correct amount of interim earnings." According to the Respondents' counsel, the General Counsel agreed to this request and based thereon, the Respondents' counsel did not file exceptions.

The Respondents' counsel argues that the "extraordinary circumstances" of this case mandate reopening the record to permit the filing of exceptions; that the Respondents waived its right to file exceptions based on a *quid pro quo*, i.e., the discriminatees' waiver of their right to reinstatement; that the settlement stipulation explicitly required waiver of the Respondents' right to file exceptions; that by the time the parties reached agreement on November 5, 1992, "it was too late to request a further extension to file exceptions"; that the only choice "was to file exceptions or reach agreement"; that the fact that the Respondents did not file exceptions is evidence that the parties had reached agreement, and, accordingly, "in the interest of justice [the discriminatees] have reneged on their agreement to waive reinstatement" and the Respondents should be permitted to file its exceptions out of time.

The General Counsel filed a response to the Respondents' motion, advising that it was not until the Respondents questioned the discriminatees' interim earnings and the discriminatees failed to receive the first scheduled payment in December 1992 that one of the discriminatees took the position that he was no longer willing to forego reinstatement. The General Counsel submits that the Respondents allowed the November 6, 1992 deadline for filing exceptions to pass without either filing exceptions or requesting additional time for filing exceptions, apparently in the belief that an agreement had been reached or would be reached. Therefore, the General Counsel opposes reopening the record to permit exceptions to be filed. The General Counsel does not specifically dispute the Respondent's factual assertions.

Having duly considered the matter, the Board has decided to permit the Respondents to file exceptions out of time. In our view, the parties had agreed on a settlement on November 5, 1992, under which the two discriminatees would waive reinstatement, but a provision to that effect would not be part of the stipulation. In addition, the parties agreed that the interim earnings figures would be as listed in the stipulation, subject to

¹ Although denominated a motion to reopen, the Board is construing Respondents' motion as an excusable neglect appeal under Sec. 102.111(c) of the Board's Rules and Regulations. Respondents' motion is supported by the requisite affidavit under Sec. 102.111(c).

revision if a Social Security report showed additional interim earnings. In this regard, the Respondents permitted the General Counsel to be the sole judge of the accuracy of the report and of the need for any modification of the interim earnings.

Based on this agreement, the Respondents did not file exceptions on November 5 or the due date of November 6. We find, based on the essentially uncontroverted facts, that the Respondents did not file exceptions because there was a full agreement on November 5, a provision of which was that exceptions would not be filed. The fact that Respondent did not sign the stipulation on November 5 is of no particular significance because the interim earnings figures were subject to change.²

Plainly, the Respondents' counsel was confident that agreement had been reached on all terms. Indeed, there had never been any disagreement as to the terms of the agreement. Were it not for the fact that one of the discriminatees later reneged on the agreement and would no longer waive reinstatement, the matter would have been settled.³

² The fact that the backpay figures were subject to change does not mean that there was no agreement. The Respondents agreed to let the General Counsel be the sole judge as to any such changes.

³ Apparently, the discriminatee changed his mind because he did not receive a backpay check on December 1. However, the backpay

In these circumstances, we believe that there was "good cause" for the failure to file timely exceptions. The Respondents thought that there was a settlement agreement, and indeed there was such an agreement. Thus, even if there was neglect, we believe that it was excusable. Nor do we believe that consideration of the Respondents' exceptions on their merits will now unduly prejudice the General Counsel. Indeed, the converse is true. Not permitting exceptions to be filed would unduly prejudice the Respondents. Instead of the settlement that it reached, it would be faced with a Board order and the prospect of possible further litigation of compliance issues. In the circumstances of this case, this would be particularly inequitable because it is the discriminatee who reneged on the prior agreement to waive reinstatement. Accordingly,

IT IS ORDERED that the Respondents' motion to file exceptions out of time is granted and the Board's Order of December 4, 1992, is vacated.

Exceptions to the judge's decision are due in Washington, D.C., on or before 28 days from date of issuance.

check could not be written on December 1 because the interim earnings figures were not yet final. The Social Security report had still not been received.